

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION THREE

JOHN W. et al.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Real Party in Interest.

G034086

(Super. Ct. No. DP005179)

O P I N I O N

Original proceedings; petitions for a writ of mandate to challenge orders of the Superior Court of Orange County, Dennis Keough, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petitions denied.

Law Office of J. Michael Hughes and Lawrence A. Aufill for Petitioner  
John W.

Donna P. Chirco for Petitioner Elisa G.

No appearance for Respondent.

Benjamin P. de Mayo, County Counsel, and Ward Brady, Deputy County Counsel for Real Party in Interest, Orange County Social Services Agency.

\*

\*

\*

Petitioners John W. (father) and Elisa G. (mother), parents of Alexandria G. (Alex), now four and one-half years old, seek extraordinary relief from the court's order granting a Welfare and Institutions Code section 388<sup>1</sup> petition brought on Alex's behalf by her counsel. The petition requested the removal of Alex from petitioners' custody and placement with her maternal aunt and de facto parent, Darla G. (Darla). During the course of the hearing on the section 388 petition, and in connection with a previously scheduled six-month review, the court also terminated reunification services and scheduled a selection and implementation hearing under section 366.26 (.26 hearing).

Petitioners raise joint and individual issues in their separately brought petitions. Mother contends the section 388 petition was improper because appointed counsel for the minor lacked standing. She argues the relief sought required counsel to make an application to the social worker under section 329 to commence a new section 332 petition. Mother and father contend the section 388 petition was improperly granted because the evidence was insufficient to show there had been a change of circumstances and a change of custody was in Alex's best interest. Mother asserts the visitation schedule set by the court was too restrictive because it required parents to have monitored visits; and father argues the court erred by failing to hold an immediate detention hearing prior to the section 388 hearing.

We find no error. Accordingly, we deny the parents' petitions for writ of mandate, and deny as moot the requests to stay the .26 hearing.

---

<sup>1</sup>

All further statutory references are to the Welfare and Institutions Code.

## FACTS

### *Summary of Proceedings During the First Three Years of Dependency*

Alex was removed from her parents' custody in May 2001, on a petition filed by the Los Angeles County Department of Social Services alleging she came within the provisions of section 300, subdivisions (b) (failure to protect), (g) (failure to support) and (j) (abuse of sibling). The parents pleaded no contest to an amended petition, and the allegations of the petition were found true with respect to section 300, subdivisions (b) and (j). Alex was placed with Darla, her maternal aunt. Shortly thereafter, because the parents lived in Orange County, the case was transferred to the Orange County Juvenile Court.

The parents received 18 months of reunification services as recommended by the Orange County Social Services Agency (SSA). During this period, on June 5, 2002, Darla and her husband Eugene (Gino) were designated de facto parents. At the 18-month review hearing, scheduled for November 12, 2002, SSA recommended Alex be placed with her parents for a 60-day trial visit, as the mother and father had made satisfactory progress toward alleviating or mitigating the causes which had necessitated court intervention: The parents had moved into a one-bedroom apartment, father was employed full time, was in compliance with terms of his probation, had completed his counseling and parenting class, and mother had also completed her residential drug program and her parenting class.

Darla and Gino did not support Alex's return to the parents. They felt mother would soon relapse and start using drugs again. Darla also complained about the care Alex received while visiting her parents. Darla said Alex frequently vomited after visiting her parents, causing her to believe the parents fed her candy, a charge the parents denied. Noting the parents and the de facto parents had a "poor relationship," and "actively dislike[d] each other," the social worker doubted the accuracy of the

information from each party about the other. Nevertheless, the court ordered a 60-day trial visit, and provided weekend visits for Darla and Gino from 6:00 p.m. Friday to 8:00 p.m. Saturday. The 18-month review was continued to January 2003.

During the 60-day trial visit, both parents were working full time and continued to reside in their own one-bedroom apartment, described as “clean and organized.” Alex had been placed in day care while her parents worked, and she was frequently sick during this period, a fact the social worker attributed to Alex’s introduction to day care for the first time. An in-home parenting aid reported the parents were very cooperative and receptive to services. Darla and Gino, the de facto parents, continued to visit Alex. At the conclusion of the 18-month review hearing, the court retained jurisdiction, placed Alex in her parents’ home under SSA’s supervision, ordered family maintenance services, and set a six-month review hearing.

At the six-month review held in July 2003, the social worker reported the family unit had shown signs of strain. There had been a brief two-week separation period, during which mother and Alex had moved in with Darla and Gino. And although the parents had subsequently reunited and were still employed, they were experiencing financial problems. Adding to their stress, mother’s older daughter Amber had turned 18, been released from juvenile hall, and moved in with the parents and Alex. Despite these stressors, the social worker believed Alex’s home life was stable, and recommended Darla’s and Gino’s de facto parent status be discontinued. The court ordered continued family maintenance services and set a 12-month review hearing. SSA withdrew its request to revoke Darla’s and Gino’s de facto parent status.

At the 12-month review hearing on December 17, 2003, SSA “reluctantly” recommended the termination of dependency proceedings because 12 months of family maintenance services had been provided.<sup>2</sup> Disturbing elements had surfaced again. Only

---

<sup>2</sup> It appears SSA confused termination of the dependency (§ 364, subd. (c)) with termination of family maintenance services under section 16506.

father was still employed, but mother had not informed the social worker she was no longer working. Mother and father had again separated briefly, and Alex had resided with Darla for a week. Darla expressed concern that father was abusing mother. The parents claimed Darla refused to return the child. Sensing discord in the relationship between the parents and the de facto parents, SSA set up a future visitation schedule and instructed all parties to adhere to it. Darla then reported the parents were not following the schedule, and they had allowed Alex to reside with her for five days without contacting her for two days. For their part, the parents reported Darla made it difficult for them to pick up Alex. Meanwhile, Amber, who no longer was living in the home, had brought Alex to Darla's home, without the parents' permission, claiming they were using drugs and fighting with each other, and the police had been called. But even Darla admitted she did not know if Amber's claims were true because Amber was known to be untruthful. At the conclusion of the hearing, against SSA's recommendation, the court declined to terminate the dependency, ordered Alex to remain with her parents, continued family maintenance services, and set a further review for June 11, 2004.

### *The Section 388 Petition*

On May 6, 2004, minor's counsel filed a section 388 petition requesting the removal of Alex from the parents' custody and placement with Darla and Gino. The petition alleged parents continued to engage in domestic violence and had abandoned Alex by repeatedly leaving her with Darla and Gino without providing any monetary support. According to the petition, these events were causing Alex confusion and stress. On May 6, 2004, the court entered an ex parte order that Alex remain with Darla and Gino, where she currently was staying, pending an evidentiary hearing set for May 26, 2004.

The hearing on the section 388 petition began on May 26, 2004, and ended on June 2, 2004. The court heard the testimony of several witnesses. SSA's social

worker, David Harper (Harper) testified he had been Alex's social worker since February 2002, when Alex was still in Darla's custody. Harper opined Alex needed to be removed from her parents' custody because she was suffering "emotional detriment" from her parents' unresolved marital conflict and the time she was spending out of her parents' care. Harper characterized "emotional detriment" as "interference with the . . . bonding that would be appropriate for a child that age. . . . The lack of a feeling of [a] safe attachment with the parents having problems and then her being out of the parents' care." According to Harper, this detriment was reflected in Alex's "acting out" while in the care of the de facto parents.

Since the date Harper took over Alex's case, he had expressed concern to the parents on "numerous occasions" regarding the amount of time the parents allowed Alex to spend with the de facto parents. In Harper's view, this conduct had created "instability [and] . . . confusion with [Alex] going back and forth." Alex did not know where her real home was or who her real parents were. Mother also failed to be honest with Harper about how much time Alex was spending with the de facto parents, and failed to advise the social worker of her plans for Alex's care during the recovery period after the birth of another child by Caesarean section surgery.

Harper also expressed concern regarding the ongoing marital discord between the parents. Harper recalled that as late as April 12, 2004, mother had called him and said she would be leaving father to stay with Darla. In addition, without notifying Harper, the parents had moved out of their apartment and moved in with the paternal grandfather. Upon investigation, Harper believed grandfather's residence presented a safety hazard. The house was cluttered and crowded with boxes, and dangerous items such as scissors, crazy glue, and the grandfather's medications were openly accessible to the child.

Darla testified SSA had placed Alex with her in 2001 when she was one-year old, and the child continued in her custody for one and one-half years. After Alex

was returned to her parents' custody, Darla was to have visitation one evening a week, but Alex spent much more time with Darla because the parents failed to pick her up when they said they would, and often left Alex in Darla's care without informing her of their whereabouts. From December 23, 2003 through January 3, 2004, Alex stayed with Darla and Gino, not spending Christmas with her parents, who also ignored her birthday. Moreover, Alex had been left with Darla from April 2 until the filing of the section 388 petition on May 6, 2004.

Darla also testified about recent bouts of parental discord. In December 2003, she filed a child abuse report when, after an argument between the parents, father drove his truck in a threatening manner at Darla's car while mother and Alex were in Darla's car with her. Darla also kept Alex in her care from February 6 to February 22, 2004, because mother was "stressed out" from conflict with father.

On April 11, 2004, mother called and asked Darla to pick her up at a motel where she had been staying because she was trying to "avoid" father: she also needed money to pay the motel bill. The next day Darla was going to take mother, who was pregnant, to a doctor's appointment. But mother wanted to go home and demand money from father for the medical appointment co-payment. Darla recalled mother was very angry with father because he was not providing financial support for her and Alex. Shortly thereafter, Darla observed mother and father fighting near father's truck.

Mother testified that much of what was said about her was wrong, and that 95 percent of her arguments with father were about the amount of time she allowed Alex to spend with Darla. Mother denied she and father had been involved in any domestic disputes since the summer of 2003. She claimed that even though Alex had been returned to her custody, she allowed Darla to have the child for overnight visits because Alex and her aunt were very attached to one another and she did not want to "hurt either one of them." Mother admitted Harper had advised her Alex was spending too much time with Darla and Gino. But she explained that on a number of occasions when she

went to pick up Alex, she had to wait hours for Darla and Gino to return, so she often went home without the child.

A family cousin, fourteen-year-old Trina, testified she has known mother all her life because her uncle is the father of mother's three older children. When asked why she was testifying, Trina said she was thinking about Alex's well-being and hoped "she could be more safe and . . . so she has a better house and stuff like that." In late August or early September 2003, Trina spent time at the parents' apartment while visiting Amber, and saw a drug pipe on a dresser in the parents' bedroom. Trina also saw people smoking marijuana in the parents' home during that time. She also testified father tried to run down mother while mother, Amber, and Trina were inside mother's car.

### *The Court's Ruling*

Commenting that the case was "unusual in a lot of respects," the court decided to remove Alex from parental custody and place her with Darla and Gino. The court noted there was "significant ongoing marital discord between mother and father." Inter alia, mother had contemplated leaving father on several occasions; there had been incidents of physical violence, and father had threatened to run mother down with his truck; mother had felt compelled to stay at a motel to get away from father. The court found these incidents created not only an "emotional risk of detriment but an explicit, physical risk of detriment as well." It concluded, "a fair analysis of the testimony and evidence that has been presented is that the mother and father's relationship has been tumultuous, has been unstable, interpersonal, there has been evidence of discord, extrinsic and implicitly and explicitly."

But the court further observed that Darla's willingness to have Alex in the home "has developed into a situation that has posed concerns. . . . [¶] [T]here is a, what would seem to be to the trier of fact, in some respects, a passive aggressive attitude



towards the return of the child.” The court also noted that whether justified or not, the mother’s family exhibited “an inappropriate level of hostility towards the father.”

Nevertheless, the court found, by the standard of “clear and convincing” evidence, that Alex should be removed from her parents’ custody and placed with Darla and Gino. It found there was a “change of circumstances” from the last six-month review. And “there is by clear and convincing evidence a risk to the emotional . . . and to the physical well-being of the child.”

On June 14, 2004, the court heard additional testimony related solely to the issue of visitation as part of what it termed the last “segment” of the hearing on the section 388 petition. After hearing testimony from the social worker and father, and specifically noting concerns about the volatility and instability of the parents’ relationship, the court ordered a separate visitation schedule of four hours per week unmonitored, for each of the parents. The court also ordered mother and father could instead elect to have a conjoint visit of up to eight hours, provided they were able to arrange for monitoring by the maternal grandmother. Finally, the court ordered the termination of reunification services, and set a .26 hearing for October 7, 2004.

## DISCUSSION

### *Minor’s Counsel May Request a Change of Custody With a Section 388 Petition*

Mother argues the court should not have heard the section 388 petition. She contends it was really “Darla’s petition.” According to mother, Darla should have proceeded under section 329 by requesting the social worker to initiate a new section 332 petition, and if the social worker failed to act on her request, she should have brought the matter to the court’s attention under section 331. But the court had already acquired jurisdiction over Alex, and the dependency proceedings had not been terminated. Thus, a new section 332 petition would have been superfluous. Mother cites no apt authority for

her novel argument. A brief must contain reasoned argument and legal authority to support its contentions, or the court may treat the argument as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Whether or not deemed waived, mother's argument lacks merit. In *In re Victoria C.* (2002) 100 Cal.App.4th 536, we held a section 388 petition was an appropriate procedure for a noncustodial father to seek removal of the minor from mother's custody. We noted, "[T]he only difference between a request for removal of a child from a parental home and any other order is a more stringent burden of proof: a request for removal from a parental home, or to a 'more restrictive placement,' requires clear and convincing evidence that grounds for removal exist." (*Id.* at p. 543.) Provided the moving party has standing to bring a section 388 petition, we see no basis to restrict the *Victoria C.* holding as applicable only to a noncustodial parent.

We did, however, request supplemental briefing on the question whether minor's counsel has standing under section 388 to bring a petition for modification on behalf of the minor. Section 388 allows "[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made." All parties agree that persons "having an interest in a child" are those whose relationship with the child would survive the dependency proceedings. Counsel appointed to represent a child in dependency is charged with many duties. (§ 317, subds. (d) & (e).) But representation of the minor after termination of the dependency is not one of them. And section 317, subdivision (e) expressly provides that minor's counsel "is not required to assume the responsibilities of a social worker and is not expected to provide nonlegal services to the child." Thus, counsel is not "a person having an interest" in the child.

The closer question is whether minor’s counsel is a “properly appointed guardian” as that phrase is used in section 388. We are persuaded by the carefully reasoned opinion in *In re Charles T.* (2002) 102 Cal.App.4th 869, that the expanded duties of minor’s counsel under section 317, subdivision (e) make minor’s appointed counsel the functional equivalent of a guardian ad litem *in a dependency proceeding*. (*In re Charles T., supra*, 102 Cal.App.4th. at pp. 878-879.) As explained in *In re Charles T.*, “Minor’s counsel advocates for the protection and safety of the child, investigates, participates in presenting evidence to the court, advises the court of the child’s wishes, and investigates interests of the child beyond the dependency. [Citation.] These functions are both more and less than a traditional guardian ad litem in an adversarial proceeding, but are precisely those necessary to provide an independent voice for the child.” (*Id.* at p. 878.) Further, with respect to dependency proceedings, the judicial council has recognized the functional equivalency between the role played by minor’s counsel and the role of guardian by providing in rule 1430(e)(3) of the California Rules of Court that “[a] petition for modification hearing may be filed by: [¶] . . . [¶] The parent or guardian, the child, *the attorney for the child*, or any other person having an interest in a child who is a dependent.” (Italics added.) Although the rule does not precisely follow the language of section 388, the purpose of the statute — to give the dependent child an independent voice in the dependency proceeding — is fully satisfied by allowing minor’s counsel to file a section 388 petition. Accordingly, the court did not err in allowing minor’s counsel to file and be heard on the section 388 petition.

#### *No Abuse of Discretion Has Been Shown*

Mother and father argue the evidence failed to establish the grounds for granting a section 388 petition, i.e., that a change of circumstances required a changed order to serve Alex’s best interest. In addition, father complains the court failed to make an express finding that the modification of custody was in Alex’s best interest. Father

also argues the evidence was less than clear and convincing that Alex was at risk of emotional or physical harm if custody remained with her parents.

Relief under section 388 may be granted where a preponderance of the evidence shows changed circumstances or new evidence and the proposed change would promote the best interests of the child. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) And under section 361, subdivision (c)(1), the removal of a child from the parents' custody requires a showing by clear and convincing evidence that "[t]here is substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor or would be if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the . . . parents' . . . physical custody."

Mother and father virtually ignore the standard of review on appeal. But we may not. "Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Michael B.*, *supra*, 8 Cal.App.4th at p. 1704.) But because the section 388 petition sought removal of the child from the parent's custody, we must also review the court's finding of detriment to the child under section 361, subdivision (c).<sup>3</sup> This finding is reviewed for substantial evidence. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135; *In re Heather A.* (1996) 52 Cal.App.4th 183, 193; *Robert L. v. Superior Court* (1996) 45 Cal.App.4th 619, 625.)

Here, the evidence amply supported a finding of changed circumstances. When Alex was originally returned to the custody of the parents, they were living in their own apartment, both were working, and each had substantially complied with their case plan. In contrast, the evidence established new instances of family violence, mother was

---

<sup>3</sup> California Rules of Court, rule 1432(f), requires that if a section 388 request is "for the removal of the child from the child's home, the petitioner must show by clear and convincing evidence that the grounds for removal in section 361(c) exist."

no longer working, the parents had moved into the paternal grandfather's home, for which the social worker had safety concerns, and Alex had been left for extended periods with Darla, without provision for support, and often without leaving information on how to contact the parents. This evidence was manifestly sufficient to show a change of circumstances. And the evidence of father threatening to run down mother and Alex with his truck establishes, as the court found, not only an "emotional risk of detriment but an explicit, physical risk of detriment as well." Although father complains the court did not make an express finding that Alex's removal from her parents' custody was in her best interests, a fortiori the finding of the emotional and physical risk to which she would be exposed if living with her parents constitutes a finding that it was in her best interests to live elsewhere. Substantial evidence supports the court's findings, and we perceive no abuse of discretion in making the order to remove Alex from her parents' custody.

*The Court Did Not Abuse Its Discretion In Making the Visitation Order*

On June 14, 2004, the court heard additional testimony related solely to the issue of visitation as part of the hearing on the section 388 petition. After hearing testimony from the social worker and father, and noting specifically its concerns related to the volatility and instability of the parents' relationship, the court ordered a separate visitation schedule of four hours per week, unmonitored, for each of the parents. The court also allowed mother and father to elect instead a conjoint visit of up to eight hours provided they were able to arrange for monitoring. Mother complains about the terms of the court ordered visitation, but has no specific alternative to suggest. Instead she suggests the court should have granted "liberal unmonitored visitation."

Because the procedural posture of the case was moving towards a permanency hearing, Harper recommended reduced visitation would be more consistent with that direction. And because of father's working schedule, the addition of the newborn baby, and the requirement for monitoring, the logistics of the visits were

somewhat difficult. Harper was also concerned about providing unmonitored visits because of the risk of domestic violence between the parties.

“Courts have long held that in matters concerning child custody and visitation trial courts are vested with broad discretion. On appeal the exercise of that discretion will not be reversed unless the record clearly shows it was abused.” (*In re Megan B.* (1991) 235 Cal.App.3d 942, 953.) The record here does not show abuse of discretion, much less a clear abuse of discretion. We will not interfere with the court’s visitation order.

#### *Whether a Detention Hearing Was Required is a Moot Issue*

Father argues his procedural due process rights were violated when SSA allowed Alex to remain at Darla’s house pending the section 388 hearing without immediately scheduling a detention hearing under sections 313 and 315.

The issue is now moot. The court held a full section 388 hearing, and, after hearing testimony, ordered Alex placed with Darla. “[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed.” (*In re Dani R.* (2001) 89 Cal.App.4th 402, 404.) If the failure to hold a detention hearing for a child already declared a dependent of the court was error (which we do not decide), it cannot, in any event, now be remedied. The section 388 hearing established grounds to remove Alex from her parents’ custody.

#### DISPOSITION

The petitions are denied. The requests to stay the .26 hearing are denied as moot.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.